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In The Supreme Court of the United States October Term, 1991

SILAS ALEXANDER, et al.,

v.

CHICAGO PARK DISTRICT, et al.,

RUFUS COOK
and
COOK PARTNERS LAW OFFICES, LIMITED,
Counsel for Plaintiffs in the District Court,
Petitioners

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE L. SAUNDERS, JR.
Counsel of Record

LEE A. MONROE
THOMAS F. BUSH, JR.
THOMAS A. DOYLE

SAUNDERS & MONROE
205 North Michigan Avenue
Suite 4201
Chicago, Illinois 60601
(312) 946-9000

Counsel for Petitioners

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REPLY TO BRIEF IN OPPOSITION

Preliminary Statement

Pursuant to Supreme Court Rule 15.6, Petitioners hereby submit this Reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari. This brief addresses an important new issue that is raised in the Brief in Opposition: The

parties reached a partial settlement of the matters pending before the District Court. (Brief in Opposition at 1-2). In January 1992, Petitioners paid the principal amount in dispute to the class members and, upon such payment, the District Court agreed to lift all contempt charges and to lift all charges for interest. (Appendix to Brief in Opposition). In their brief, the Respondent argues that the Petition for a Writ of Certiorari should be denied because the matter in question became moot upon execution of that settlement. (Brief in Opposition at 2-3). But as this Reply Brief will demonstrate, this matter is not moot, as it involves important issues that relate to the professional reputations of a lawyer and a law firm. But even if the Respondent is correct, the proper remedy is to grant certiorari, dismiss the case as moot, and vacate the judgments below.

Argument

I. Significant Collateral Consequences of The District Court's Contempt Order Prevent a Finding of Mootness.

Ordinarily, where a dispute is settled by the parties, the case becomes moot, and there is no longer a justiciable controversy that may be addressed by any court. That rule, however, is not without exception.

The most important exception to this general rule is found in this case: a matter is not moot if the collateral consequences to the lower court's decision will adversely affect a party's interests. In such a case, the collateral consequences preserve the actual controversy, allowing the court to hear the dispute. This rule was set out by this Court in Carafas v. LaVallee, 391 U.S. 234 (1968), where a prisoner appealed the denial of a petition for a writ of habeas

corpus. While the appeal was pending, the prisoner was released after serving the balance of his sentence. Id. at 236. The state argued that the appeal on the habeas petition was moot, but this Court held that the prisoner could suffer significant adverse collateral consequences to a criminal conviction, such as restrictions on his rights and damages to his ability to gain certain types of employment. Id. at 238-39. Such collateral consequences were sufficient to prevent the matter from being moot, thereby allowing the Court to hear the appeal. Id. See also Sibron v. New York, 392 U.S. 40 (1968).

In our case, the collateral consequences doctrine prevents the case from being moot. There are significant collateral consequences of the District Court's contempt finding that could have an important bearing on the legal

careers and professional reputations of the Petitioners. For example, as a result of this controversy, the Petitioners have been served with a complaint from the Illinois Attorney Registration and Disciplinary Commission[1]. If certiorari is granted, this Court may address important issues that relate to the propriety of the Petitioners' actions, which could have a direct bearing on the Petitioners' defense in that pending disciplinary action.

Even beyond the pending disciplinary proceeding, the lower court's proceedings have placed a terrible scar on the Petitioners' reputations. The District Court's contempt finding against the Petitioners rests upon a number of highly defamatory remarks: in its opinions, the

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[1] The disciplinary proceeding is captioned Rufus L. Cook, In Re Earline Oglesby, No. 89-CI-4050.

District Court accused the Petitioners of "egregious" behavior, of misleading the court, of intentionally circumventing the court's orders, of willfully disobeying orders from the court, of being more interested in their own financial benefit than the interest of the class, of acting in an unscrupulous fashion toward the class members, and of declining to request attorneys' fees because the Petitioners recognized that the work that they had performed was substandard.[2] In the Seventh Circuit Court of Appeals opinion, that court accused the Petitioners of intentionally deceiving the District Court, suggested that the Petitioners hid the existence of the contingent fee agreements from the District

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[2] The District Court statements are contained in several orders in Alexander v. Chicago Park Dist., No. 79 C 2242 (N.D. Ill.). The statements appear as follows: October 4, 1988 Order at 9-11; April 2, 1990 Order at 8; December 6, 1988 Order at 5; and September 26, 1988 Order at 16, 18.

Court, and chastised the Petitioners for unprofessional conduct. (Appendix to Petition for Writ of Certiorari at 18-21, 22-23)

As is fully explained in the Petition for a Writ of Certiorari, these charges have absolutely no basis whatsoever. Throughout this litigation, the Petitioners have comported themselves with a degree of service to the class that is to be emulated: they prosecuted the class members' claims for more than ten years without ever demanding compensation for their services; they sought only a portion of the massive costs that they had incurred in those ten years of litigation; they kept the District Court fully informed of their intentions and their actions with respect to their contingent fee agreements with the class; and they achieved substantial benefits for the class members.

In short, there is no basis for the inflammatory, damaging statements made in the lower court opinions, and such statements clearly threaten the future of the Petitioners' careers.

And the Petitioners' professional reputations are especially important, given the nature of their law practice, which involves class action civil rights litigation. Under Rule 23 of the Federal Rules of Civil Procedure, a court reviewing the adequacy of a putative class representative may evaluate the character of the lawyer applying to represent the class. At least one court has already cited this litigation as a basis for denying such an application. See Armstrong v. Chicago Park Dist., 117 F.R.D. 623 (N.D. Ill. 1987). Clearly, the aspersions that have been cast on the character of the Petitioners in the

opinions in this case are sufficient collateral consequences to allow the Court to hear this matter.

The collateral consequences doctrine properly applies in a civil action such as this case. For example, in Papish v. Board of Curators of the Univ. of Missouri, 464 F.2d 136 (10th Cir. 1972), a lawsuit brought by a graduate student to challenge a University disciplinary action against her, the appellee argued that the matter was moot because the student had been dismissed from the University for academic reasons while the appeal was pending. The Fifth Circuit Court of Appeals held that the case was not moot because the lower court's decision still had collateral consequences for the student, whose reputation had been irreparably damaged by the disciplinary action. Id. at 141-42. On that basis, the Fifth Circuit considered

the merits of the controversy. Id. at 142-45. The United States Supreme Court later granted certiorari on that case and reversed the Fifth Circuit's decision on the merits but never addressed the mootness issue. Papish v. Board of Curators of the Univ. of Missouri, 410 U.S. 667 (1973). A number of other appeals in civil cases also have applied the collateral consequences doctrine.[3]

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[3] See, e.g., Wiley v. National Collegiate Athletic Assn, 612 F.2d 473 (10th Cir. 1979) (validity of athletic records was sufficient collateral consequence to preclude a finding of mootness in lawsuit to block revocation of eligibility of an athlete, despite fact that such eligibility expired pending the appeal); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980) (risk that restrictions on school curriculum could chill academic freedom was sufficient collateral consequence to preclude a finding of mootness, despite the fact that restrictions were abandoned pending appeal); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (stigma associated with Navy disciplinary action was sufficient collateral consequence to preclude a finding of mootness in a lawsuit seeking to block early discharge, despite fact that sailor allowed his term of enlistment to expire pending the appeal); Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972) (threat that university disciplinary action could mar an academic record was sufficient collateral

(continued...)

And a number of courts have held that an attorney's reputation may serve as a collateral consequence sufficient to preclude a finding of mootness. For example, the collateral consequences doctrine was applied in Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974), a lawsuit seeking to block a disciplinary proceeding brought against a lawyer who was accused of bribing a foreign official. As part of its defense, the State of New York alleged that the lawsuit was moot because, during the pendency of the appeal, the lawyer had been suspended from the practice of law, the period of suspension had expired, and the lawyer had died. Id. at 133-36. The district court disagreed,

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[3](...continued)
consequence to preclude a finding of mootness, despite the fact that student had been readmitted pending the appeal); Hatter v. Los Angeles City High School Dist., 452 F.2d 673 (9th Cir. 1971) (disciplinary action that threatened to prejudice applications for college admission was sufficient collateral consequence to the student to preclude a finding of mootness).

finding that an attorney's reputation is so important to his career that the case would be allowed to proceed. Id. at 136. Similarly, in both United States v. Lee, 720 F.2d 1049 (9th Cir. 1983) and United States v. Schrimsher, 493 F.2d 842 (5th Cir. 1974), the court held that a finding of criminal contempt has significant collateral consequences for a lawyer's professional reputation, precluding a finding of mootness, even after the attorney had completed the sentence. And in In re Kave, 760 F.2d 343 (1st Cir. 1985), the court held that an attorney's compliance with a civil contempt order would not render the case moot because a contempt finding could result in disciplinary proceedings against the lawyer. Such proceedings, the court held, constituted collateral consequences that precluded a finding of mootness. Id. at 353.

Hence, the settlement of the monetary aspects of the case does not moot this appeal, as the issues before the court are important to the professional reputation and livelihood of the Petitioners.

II. If the Case Is Moot, the Proper Course of Action Would Be to Grant Certiorari and Vacate the Lower Court Decisions.

Assuming that this Court determines that this cases is moot, the Respondent has suggested the wrong remedy: rather than mandating a denial of certiorari, a finding of mootness mandates that this Court grant the certiorari petition and vacate the judgments below. Such a result is set as the rule of law in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), where the Court stated:

> The established procedure of the Court in dealing with a civil case from a court in the federal system which has become moot on the way

> here or pending our decision is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 81 L. Ed. 178, 57 S. Ct. 202, to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 39-40. This rule of law applies where the case becomes moot while a petition for certiorari is pending before this Court. See, e.g., Chicago Board Options Exchange v. Board of Trade, 459 U.S. 1026 (1982); State Fair of Texas v. Consumer Products Safety Commission, 454 U.S. 1026 (1981); Alabama v. Davis, 446 U.S. 903 (1980); Hopper v. Barnett, 439 U.S. 1041 (1978).

This Court's procedure is fully laid out in New Left Education Project v. Board of Regents, 472 F.2d 218 (5th Cir. 1973), vacated, 414 U.S. 807 (1973). In that case, the Court of Appeals held that a settlement that was reached while an appeal was pending rendered the case moot. Id. at 220. However, even after making that finding, the Court of Appeals refused to vacate the lower court opinion, in clear violation of the Munsingwear doctrine. Id. at 221. When this Court was presented with a petition for a writ of certiorari, this court followed Munsingwear, and vacated the lower court opinions. New Left Education Project v. Board of Regents, 414 U.S. 807 (1973). This rule is also illustrated by Security Bancorp v. Board of Governors, 655 F.2d 164 (9th Cir. 1981), vacated, 454 U.S. 1118 (1981).

This case presents no reason to depart from the rule of law set out in Munsingwear. The parties reached a settlement on the financial aspect of the underlying claim -- the Petitioners agreed to pay part of the amounts allegedly due from them in return for a cessation of collection efforts against them and in return for an end to an ever-increasing contempt fine. (Appendix to Brief in Opposition). Notably, the Petitioners did not in any way pay any amount allegedly due as a penalty, as interest, or as a fine. (Appendix to Brief in Opposition). In reaching the settlement agreement, the Petitioners expressly reserved the right to prosecute this appeal to resolve the important issues remaining with respect to their professional reputations. In such circumstances, where a party has made every effort to put a matter behind him, a lower court judgment that casts aspersions on his

character should not stand, possibly to be later used in a proceeding against him. By vacating the lower court's judgment, this Court would encourage settlements in these types of cases, by allowing the parties to have a final chapter to this entire unfortunate episode, without having to worry about collateral estoppel effects of an opinion that has been found moot by this Court.

This result is only fair: if the Petitioners are not to have an opportunity to vindicate their reputations before the Court, then the Petitioners should not have to suffer the consequences of the aspersions to their character that are contained in the lower court opinions in this case. The only fair result, if this Court declines to grant certiorari on the grounds of mootness, would

be to vacate the lower court opinions in this case.

Unfortunately, the clear procedure set out in Munsingwear has not always been followed by the Seventh Circuit Court of Appeals. See, e.g., In re Memorial Hospital of Iowa County, 862 F.2d 1299, 1301 (7th Cir. 1988). As such, it appears that an order from this Court will be needed to vacate the lower court opinions in this case.

Conclusion

For the foregoing reasons, the Petitioners respectfully request that this Court allow the Petition for a Writ of Certiorari. The important issues raised by this case, which relate to the reputations and careers of the Petitioners, satisfy the collateral consequences doctrine, presenting this Court with a live controversy. In the

alternative, if this Court finds that the controversy is moot, the Petitioners urge this Court to issue a Writ of Certiorari and vacate the lower court judgments.

RESPECTFULLY SUBMITTED,

George L. Saunders, Jr.
Counsel of Record

Lee A. Monroe
Thomas F. Bush, Jr.
Thomas A. Doyle

Saunders & Monroe
205 North Michigan Avenue
Suite 4201
Chicago, Illinois 60601
(312) 946-9000

ATTORNEYS FOR PETITIONERS
RUFUS COOK AND
COOK PARTNERS LAW OFFICES LTD.